BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CATHY SOENDKER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,033,982
AVIVA, INC.	)	
Respondent	)	
AND	)	
	)	
FEDERAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the January 24, 2008 Order of Administrative Law Judge Bryce D. Benedict. Claimant was granted continued medical treatment with Craig L. Vosburgh, M.D., as the authorized treating physician for injuries suffered to her left knee on February 1, 2007.

Claimant appeared by her attorney, George H. Pearson of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, J. Scott Gordon of Overland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the Administrative Law Judge (ALJ), and has considered the same record as did the ALJ, consisting of the transcript of the Preliminary Hearing held May 30, 2007, with attachments; and the documents filed of record in this matter.

ISSUES

1. Does the Board have jurisdiction to hear this matter?

2. If so, did claimant's injuries or need for medical treatment for her left knee arise out of and in the course of her employment with respondent?

Claimant suffered an accidental injury on February 1, 2007, when she fell, landing on both knees, injuring her left wrist, back and knees. Claimant initially received treatment for back pain and right knee pain. Claimant did not receive treatment for the left knee for several weeks after the date of accident. Respondent contends claimant's left knee problems and need for medical treatment stem from a preexisting medical condition and are not work related. Claimant argues that her left knee difficulties, including the preexisting condition, was aggravated by the fall on February 1, 2007.

Claimant argues that respondent's appeal is inappropriate as this matter was decided by the ALJ in his Order of October 18, 2007, when he authorized Dr. Vosburgh as the treating physician for claimant's left knee. No appeal was taken from that Order. Claimant contends, in effect, that respondent is getting a second bite of the apple. Respondent argues that medical reports from Dr. Vosburgh, generated after the original Order of October 18, justify reconsideration of the issue of causation with regard to the left knee.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the Order of the ALJ should be affirmed.

Claimant suffered a work-related injury on February 1, 2007, when she slipped and fell on her knees as she was returning from lunch. Claimant initially received treatment for her low back and right knee complaints from several health care providers. The original medical records generated from those health care providers do not contain mention of the left knee. Respondent argues that the first mention of the left knee was to Steven L. Hendler, M.D., during claimant's March 23, 2007 examination. Discussion of those left knee complaints is contained in the April 3, 2007 letter of Dr. Hendler. Dr. Hendler's letter also makes note of the fact that claimant's left knee complaints preexisted claimant's injury of February 1, 2007.

The dispute went to preliminary hearing on May 30, 2007, at which time the ALJ referred claimant to Lowry Jones, Jr., M.D., for an independent medical examination regarding the left knee difficulties and their relation to the February 1, 2007 accident. Dr. Jones was unable to examine claimant until December 6, 2007. Claimant then requested a referral to a different doctor as the delay with Dr. Jones was unacceptable. Claimant was then seen by board certified orthopedic surgeon Thomas P. Phillips, M.D., from Dr. Jones' Dickson-Diveley Midwest Orthopedic Clinic. Dr. Phillips examined claimant on August 3, 2007, and provided a letter report to the ALJ on that same date. In the letter, Dr. Phillips noted that claimant had suffered a medial meniscus tear of the left knee that is causally and directly related to her traumatic injury of February 1, 2007. The ALJ then issued his Order of October 18, 2007, authorizing Dr. Vosburgh to treat the left knee. No appeal was taken from that Order.

Dr. Vosburgh examined claimant on November 19, 2007. This was the second time claimant was examined by Dr. Vosburgh. When he first examined her on March 26, 2007, he diagnosed claimant with persistent pain in her left knee following the February accident. He put his treatment of claimant on hold at that time, when a requested MRI of the knee was not done until October 29, 2007. The MRI showed predominantly degenerative changes, including degenerative changes of the meniscus, with a joint effusion. X-rays concurrent with the November examination revealed complete joint space loss of the medial compartment with varus alignment. Dr. Vosburgh, in his report of November 19, 2007, noted claimant had experienced degenerative changes before the February accident, but also opined the fall exacerbated those preexisting symptoms in her left knee. Dr. Vosburgh recommended a unicompartmental arthroplasty.

Respondent then filed a Motion To Clarify Court Order Or Terminate Benefits with the Workers Compensation Division on January 18, 2008. Respondent argues that the treatment recommended by Dr. Vosburgh is not to cure and relieve the effects of a work-related injury, but rather to address preexisting degenerative changes in claimant's left knee. Respondent requests that Dr. Vosburgh's treatment be limited to repairing the meniscus injury and not involve the partial knee replacement.

On January 22, 2008, claimant filed Claimant's Response To Respondent's Motion To Clarify Court Order Or Terminate Benefits. Claimant first argued, in her response, that an aggravation of a preexisting condition is compensable in Kansas. Therefore, the treatment recommended by Dr. Vosburgh should be allowed. Claimant then discusses the procedure requested by respondent, noting that no clarification is necessary with the October 18, 2007 Order of the ALJ. Claimant went on to state "but if a 12 second conference call would be helpful to respondent's understanding of the Order, then claimant's counsel would be happy to arrange it." That "12 second conference call" was held on "January 24, 2007 [*sic*]",[1] with the resulting Order being issued by the ALJ on January 24, 2008. The ALJ ordered that Dr. Vosburgh's authority to treat the left knee should not be further constrained. Respondent then appealed this matter to the Board.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

[1] Order of Administrative Law Judge Bryce D. Benedict dated January 24, 2008, at 1.

[2] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

It is clear neither K.S.A. 44-534a nor K.S.A. 2006 Supp. 44-510k limit an administrative law judge's ability to make determinations of ongoing disputed issues regarding pre- or post-award medical care.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[4]

Additionally, the Board may review those preliminary hearing orders where it is alleged that an administrative law judge has exceeded his or her jurisdiction or authority in providing or denying the benefits requested.[5]

An administrative law judge is not limited in the number of preliminary hearings which may be held in a case.[6] Furthermore, the administrative law judge has the jurisdiction and authority to amend, modify and/or clarify a preliminary order as the evidence may dictate or as circumstances may require.

Claimant, in her brief to the Board, argues that respondent's appeal is defective as no seven-day demand letter was sent, no proper notice was given, no preliminary hearing was scheduled and no evidentiary record was made. As noted in *Briggs*, the administrative law judge is not limited in either the number of preliminary hearings which may be held, nor in an action to clarify a prior Order. Additionally, the Board has long held that the

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[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 44-534a(a)(2).

[5] K.S.A. 2007 Supp. 44-551(2)(A).

[6] *Briggs v. MCI Worldcom*, No. 1,003,978, 2003 WL 21396795 (Kan. WCAB May 30, 2003).

"contemporaneous objection rule" applies in workers compensation litigation.[7] Here, claimant did not object to the lack of a hearing, the lack of a demand letter or the lack of proper notice, and claimant went so far as to offer to arrange a "12 second conference call" to help clarify the questions. This offer apparently resulted in the January 24, 2008 telephone conference which generated the January 24, 2008 Order which is the subject of this appeal. Claimant's objection to the telephone conference hearing is both untimely, and not supported by claimant's own position as memorialized in Claimant's Response To Respondent's Motion To Clarify Court Order Or Terminate Benefits, filed with the Workers Compensation Division on January 22, 2008.

K.S.A. 2006 Supp. 44-555c grants the Board the jurisdiction to review questions of fact and law as presented to and determined by an administrative law judge. The Board is not granted original jurisdiction over workers compensation issues, but is limited to considering issues on appeal from administrative law judge decisions.[8]

Additionally, the Board is limited to determining issues already determined by the administrative law judge. Here, the ALJ was not asked to decide disputes regarding the lack of a demand letter, timely notice of hearing or the propriety of the telephone hearing. The Board cannot determine such issues originally. Only an appeal from an administrative law judge's order or award gives the Board jurisdiction. Here, no such determinations have been issued by the ALJ on claimant's objections. Claimant's request that this appeal be dismissed on the above grounds is denied.

Claimant further argues that the appeal from the Order was untimely as respondent did not appeal within 10 days of the October 18, 2007 Order. This Board Member finds claimant's objection to respondent's appeal from the Order of January 24, 2008, should be denied. The Order being disputed is the January 24, 2008 Order. Respondent's application was filed with the Workers Compensation Division on February 1, 2008. This is within 10 days of the Order, and the appeal by respondent was timely.

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[9]

The ALJ appointed Dr. Vosburgh to aid in the determination whether claimant's left knee difficulties were created or aggravated by the fall on February 1, 2007.

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[7] *Cease v. R. M. Baril Gen. Contractor, Inc.*, No. 1,009,320, 2004 WL 2382722 (Kan. WCAB Sept. 30, 2004).

[8] K.S.A. 2006 Supp. 44-555c(a).

[9] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

Dr. Vosburgh's report of November 19, 2007, states that claimant's fall exacerbated her preexisting symptoms in her left knee. It is true that this record contains opinions contrary to that of Dr. Vosburgh, but this Board Member finds the opinion of an unbiased independent medical examiner appointed by the ALJ carries more weight, at least at the preliminary stage, than a doctor hired as an expert by one party or the other.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has proven, for preliminary purposes, that the injuries suffered to her left knee were, at the very least, exacerbated by her fall of February 1, 2007. Therefore, the January 24, 2008 Order of the ALJ authorizing Dr. Vosburgh to treat claimant's left knee should be affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated January 24, 2008, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April, 2008.

HONORABLE GARY M. KORTE

c: George H. Pearson, Attorney for Claimant
J. Scott Gordon, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge

[10] K.S.A. 44-534a.